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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
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8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 JEFFREY W. CALL,

12 Defendant.
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No. 2:17-PO-00016-JTR-1

ORDER ON MOTIONS

**MOTION GRANTED
IN PART
(ECF No. 49)**

**MOTION GRANTED
(ECF No. 42)**

15 This matter comes before the Court on Defendant's motion to Strike the
16 Government's Rule 16 Expert Notice and Compel Disclosure of Actual Expert
17 Opinions. ECF No. 49. In a separable aspect of this motion, Defendant
18 specifically requests that this Court strike proposed expert Nguyen's testimony
19 relating to the retrograde extrapolation and the general effects of alcohol.
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21 Also pending is the United States' motion to reconsider the Court's previous
22 ruling excluding evidence of the horizontal gaze nystagmus test. ECF No. 42.

23 **I. RULE 16**

24 Regarding expert opinion testimony of the government's witnesses, this
25 Court has considered Defendant's motion, ECF No. 49, the United States'
26 response, ECF No. 50, and the argument of counsel.

27 Defendant argues that the United States' notice of experts is procedurally
28 and substantively insufficient under Fed. R. Crim. P. 16, and requests that this

1 Court strike the expert testimony noticed therein. The United States responds that
2 its notice, in context with the discovery provided, is sufficient under Rule 16 and
3 that if the Court does find the notice infirm, that the United States should be given
4 an opportunity to cure the defect.

5 Rule 16(a)(1)(G) requires the government, on Defendant's request, to
6 provide a written summary of any testimony the government intends to use under
7 Evidence Rules 702, 703 or 705. The government has identified four such
8 witnesses, and provided a written statement with respect to each. ¹

9 The information provided by the government implies the area of each
10 witness's expertise, and specifies the issues to which the witness will apply that
11 expertise, but it does not indicate *what opinion or conclusions* will be offered
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14 ¹ **National Park Services Officer Jonathan Radovich** "... is expected to testify as to his expert
15 opinions regarding: his observations of the Defendant on August 6, 2016, and the inferences he
16 drew from those observations; the administration of field sobriety tests in this case and his
17 interpretation of the results of those tests; the clues he looks for when conducting field sobriety
18 tests; how alcohol consumption may effect a person's ability to perform field sobriety tests; the
19 interpretation of the results of field sobriety tests; and the administration of a portable breath test
20 and his interpretation of its result." ECF No. 29 at 4.

21 **Grand Coulee Police Officer Daniel Holland** "...is expected to testify as to his expert opinions
22 on: the administration of the breath alcohol content test on the Defendant using DataMaster
23 CDM 140028, this includes, but is not limited to, the steps he took when administering the breath
24 alcohol content test and whether those steps complied with the requirements set forth in RCW
25 46.61.506(4)(a)." ECF No. 29 at 5.

26 **Washington State Patrol Trooper Tom Moberg** "...is expected to testify as to his expert
27 opinions on: the reliability and accuracy of DataMaster CDM results; the reliability and accuracy
28 of the test results for DataMaster CDM 140028 on August 6, 2016; the calibration and quality
assurance procedures for maintaining DataMaster CDM machines; error rates of DataMaster
CDM machines; interferences that may affect a DataMaster CDM result; effects of body
temperature on a DataMaster CDM result; and the accuracy of records pertaining to DataMaster
CDM 140028." ECF No. 29 at 6.

Washington State Forensic Scientist David Nguyen "...is is expected to testify as to his expert
opinions on: the reliability of external standard simulator solutions, the general effects of alcohol
on the human body, which may include but is not limited to, tolerance, divided attention, HGN
as an field sobriety test, metabolism, half-life or burn-off rate, Widmark's calculation and
retrograde extrapolation; and his preparation and certification of the external standard simulator
solution 16006 (the specific simulator solution used in this case) ECF No. 29 at 7.

1 regarding this defendant, in this case. In this Court’s judgment, the disclosures do
2 not comply with Rule 16.

3 **A. RETROGRADE EXTRAPOLATION AND GENERAL**
4 **EFFECTS OF ALCOHOL TESTIMONY**

5 At the time of the hearing, Defendant specifically requested that this Court
6 strike proposed expert Nguyen’s testimony relating to the retrograde extrapolation
7 and the general effects of alcohol. The United States’ responds that it does not
8 intend to offer evidence of the retrograde extrapolation in its case-in-chief, but that
9 it still plans to introduce evidence of the general effects of alcohol through its
10 proposed expert Nguyen, as previously referenced.

11 **B. REMEDY**

12 As Defendant is out of custody, and the United States has not established
13 prejudice, this Court finds it is an appropriate remedy to require the United States to
14 disclose to the defendant in writing within fourteen days of August 14, 2017 the
15 relevant opinions of its four identified expert witnesses. This will necessitate a
16 rescheduling of the trial as set forth below.

17 **II. MOTION TO RECONSIDER**

18 For the reasons adduced in the government’s motion for reconsideration
19 ECF No. 42, the court will permit, with proper foundation, evidence of the
20 Horizontal Gaze Nystagmus “field sobriety test.” This trial is to the Court, and at
21 the close of the evidence the evidence will be assigned such weight as the Court
22 deems appropriate.

23 **ORDER**

24 Accordingly, the current trial date of August 24, 2017, is **STRICKEN**. A
25 new trial date is set for **September 20, 2017 at 9:00 a.m.**

26 Defendant’s motion, **ECF No. 49**, is **GRANTED in part**. Defendant’s oral
27 motion to strike witness Nguyen’s testimony regarding the retrograde extrapolation
28 is **DENIED** as moot.

1 Finally, noting that this is a bench trial, the Court finds that evidence of the
2 Horizontal Gaze Nystagmus test can be admitted in this bench trial. Defendant's
3 objections go to weight, not admissibility. Therefore, the United States' motion to
4 reconsider, **ECF No. 42**, is **GRANTED**.

5 **IT IS SO ORDERED.**

6 DATED August 16, 2017.



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JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE